

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEW JERSEY
3 ELI LILLY AND COMPANY, . Case No. 07-cv-3770
4 Petitioner, . NEWARK, NEW JERSEY
5 v. . Monday, April 19, 2010
6 ACTAVIS, et. al., . 10:25 a.m.
7 Respondents. .
8

TRANSCRIPT OF CONFERENCE
BEFORE THE HONORABLE MARK FALK
UNITED STATES MAGISTRATE JUDGE

11 APPEARANCES:

12 For the Petitioner: LAURA P. MASUROVSKY
CHARLES E. LIPSEY
L. SCOTT BURWELL
Finnegan, Henderson, Farabow, Garrett
& Dunner, LLP

15 MARK J. STEWART
In-house counsel, Eli Lilly & Company

16 JOHN F. BRENNER
Pepper Hamilton, LLP

18 | For the Respondents:

19 SANDOZ ERIC I. ABRAHAM
Hill, Wallack, LLP
20
21 KEITH V. ROCKEY
Rockey, Depke & Lyons, LLC

22 Transcription Service: King Transcription Services
23 65 Willowbrook Boulevard
24 Wayne, New Jersey, 07470
 (973) 237-6080

25 Proceedings recorded by electronic sound recording; transcript produced by transcription service.

1 APPEARANCES CONTINUED:

2 For the Respondents:

3 APOTEX

ALAN B. CLEMENT
J. MATTHEW GOODIN
JOSEPH N. FROEHLICH
Locke, Lord, Bissell & Liddell, LLP

4
5 MYLAN PHARMACEUTICALS,
6 INC.

THOMAS J. PARKER
VICTORIA E. SPATARO
Alston & Bird, LLP

7 AUROBINDO PHARMA, LTD.

ARNOLD B. CALMANN
Saiber Law

8

MELISSA E. FLAX
Carella, Byrne, Cecchi, Olstein,
Brody & Agnello, PC

9

WILLIAM A. RAKOCZY
Rakoczy, Molino, Mazzochi, Siwik, LLP

10

11 SUN PHARMACEUTICALS,
12 INC.

JAMES S. RICHTER
JAMES F. HURST
GAIL J. STANDISH
Winston & Strawn, LLP

13

14

15

16

17

18

19

20

21

22

23

24

25

1 NEWARK, NEW JERSEY, MONDAY, APRIL 19, 2010, 10:25 A.M.

2 (Call to Order of the Court.)

3 THE COURT: All right. Good morning. This is Eli
4 Lilly versus Actavis. It's docket 07-3770.

5 Would Counsel place their appearances on the record,
6 please.

7 MS. MASUROVSKY: Good morning, Your Honor. Laura
8 Masurovsky, Charlie Lipsey, Scott Burwell, of Finnegan,
9 Henderson, Farabow, Garrett, and Dunner, of Washington D.C.,
10 for Eli Lilly and Company.

11 And we are accompanied by our in-house counsel for
12 Eli Lilly and Company, Mark Stewart.

13 UNIDENTIFIED MALE: (Whispers) John Brenner.

14 MS. MASUROVSKY: Oh, and -- I'm sorry -- and -- and
15 John Brenner, of course --

16 THE COURT: Welcome.

17 MS. MASUROVSKY: -- from Pepper Hamilton.

18 MR. BRENNER: Not a problem, Your Honor.

19 MS. MASUROVSKY: Sorry, Your Honor.

20 MR. ABRAHAM: Good morning, Your Honor. Eric
21 Abraham, from Hill, Wallack, on behalf of Defendant, Sandoz,
22 and my co-counsel, Mr. Keith Rockey, from Rockey, Depke, and
23 Lyons, of Chicago.

24 UNIDENTIFIED MALE: I'll let everybody else speak for
25 themselves, Your Honor. There's quite a crowd here.

1 THE COURT: Okay.

2 MR. CLEMENT: Your Honor, Alan Clement, from the law
3 firm of Locke, Lord, Bissell, and Liddell, on behalf of
4 Defendant, Apotex. And with me is Mickey Goodin and Joe
5 Froehlich.

6 THE COURT: Okay.

7 MR. PARKER: Good morning, Your Honor. Tom Parker,
8 representing Mylan Pharmaceutical, Inc. Your Honor, I'm here
9 also with Vicky Spataro, who's also of the law firm of Alston
10 and Bird.

11 A local counsel, Arnie Calmann, from the Saiber law
12 firm. Arnie -- Mr. Calmann is currently on the telephone
13 conference with Judge Salas, and he'll be joining us in -- in a
14 few moments.

15 THE COURT: Okay.

16 MR. PARKER: Thank you, Your Honor.

17 MS. FLAX: Good morning, Your Honor. Melissa Flax,
18 from Carella, Byrne, for Aurobindo Pharma. With me is William
19 Rakoczy, from the Rakoczy, Molino firm.

20 MR. RAKOCZY: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. RAKOCZY: Good morning.

23 MR. RICHTER: Good morning, Your Honor. James
24 Richter, of Winston and Strawn, on behalf of Sun
25 Pharmaceutical. With me is Jim Hurst, from our Chicago office,

1 and Gail Standish, from our L.A. office.

2 MR. HURST: Good morning, Your Honor.

3 MS. STANDISH: Good morning, Your Honor.

4 THE COURT: All right. Good morning.

5 All right, this case has a firm trial date of May
6 18th, as we all know. Today, we're here for the final pre-trial
7 conference.

8 I said that the parties could bring the final pre-
9 trial order today, and I see it's been delivered to me. It
10 looks rather lengthy. And my thought is to go through it and
11 -- with you. It should be, I would expect, unless there are
12 any glaring problems, that we should be able to accomplish that
13 relatively quickly.

14 I know that Judge Cavanaugh has asked that the trial
15 briefs be filed today. I have Eli Lilly's trial brief. Do the
16 other parties have trial briefs?

17 UNIDENTIFIED MALE: Yes, Sir.

18 UNIDENTIFIED MALE: Yes --

19 THE COURT: Okay.

20 UNIDENTIFIED MALE: -- yes, Your Honor.

21 THE COURT: I don't know if they're in this package
22 or they're just being delivered to Judge Cavanaugh. It doesn't
23 matter to me.

24 UNIDENTIFIED MALE: I believe they were filed and
25 also --

THE COURT: Okay.

2 UNIDENTIFIED MALE: -- believe they were delivered to
3 Judge Cavanaugh.

4 THE COURT: Then that's just fine.

5 So I think what I'd like to do is get the final pre-
6 trial before you, and we'll go through it.

7 (Pause in proceeding)

8 THE COURT: And I'm going to just start flipping
9 through it. The first, you know, section is jurisdiction,
10 which is fine.

11 Now, your pending and contemplated motions, you have
12 no -- no motions are pending. But you have *in limine* motions
13 to be filed with the Court on April 26th. The briefing to be
14 completed by May 3rd; dates that we have discussed in the past.

15 But you don't list the *in limine* motions and/or
16 Daubert motions, which I'm not sure -- I'm troubled by. But I
17 want to make sure that there are no motions in there that would
18 be magistrate judge-type of motions that would go to discovery
19 issues or problems with discovery, thing(sic) like -- things
20 like that. Are there any such motions?

MS. MASUROVSKY: Your -- Your Honor, on behalf of
Lilly, we believe that there is one that is ripe(phonetic) for
your resolution, and -- and that is one of the witnesses that
Lilly intends to call live at trial, Dr. Steven Paul(phonetic),
is being called. He was identified as a witness in numerous

1 depositions taken before the close of fact discovery.
2 Defendants inquired about him. They chose not to depose him.
3 And now they're complaining that he should not be called live
4 at twil(sic) -- at trial.

5 He is going to be taken live, because the person who
6 had been intended to be in his place, Dr. Watanobbi(phonetic),
7 passed away last year, and so Lilly will not have the
8 opportunity to take his deposition(sic) -- his testimony live
9 at trial.

10 And so we have intended to call and listed Dr. Steven
11 Paul. And, in numerous depositions, Defendants inquired about
12 him at length. Dr. Watanobbi described that he was the person
13 in charge of the development of this drug and reported to him.

14 It's very clear that Rule 26 -- they are -- they are
15 complaining because he wasn't listed on the initial disclosure,
16 under Rule 26. But Rule 26 is very clear that you only need to
17 supplement in writing if the witness hasn't been otherwise
18 disclosed to the other side in depositions.

19 Mi -- Dr. Paul's name appears on numerous exhibits
20 that they have listed on their exhibit list. He is the sole
21 author on -- on at least one of them and was listed as a
22 recipient on other of their exhibits.

23 If I may tender up, Your Honor --

24 THE COURT: Mmm-hmm.

25 MS. MASUROVSKY: -- I have copies of the depositions

1 in which they inquired about him and were told about his
2 intimate relationship with Dr. Watanobbi in discussions about
3 the development of this drug.

4 THE COURT: Let's -- let's just hold off for a
5 minute. This, is it a fact witness or --

6 MS. MASUROVSKY: Yes.

7 THE COURT: -- an expert?

8 MS. MASUROVSKY: Yes, Your Honor, a --

9 THE COURT: A fact witness.

10 MS. MASUROVSKY: -- fact witness.

11 THE COURT: And he was not or he was identified in
12 initial disclosures?

13 MS. MASUROVSKY: He wasn't listed on the initial
14 disclosures; Dr. Watanobbi was. But, during the course of
15 discovery, as -- beginning in August of 2008, he was identified
16 by the -- one of the inventors on the patent as being involved
17 in the chain of command and the management of the development
18 of the drug.

19 And then again, Defendants inquired about his role in
20 the development of the drug, of the clinical investigators who
21 conducted the clinical trial for the development of this drug
22 at Mass(phonetic) General Hospital, and they were specifically
23 told that -- and asked about what they discussed with Dr. Paul.

24 The Defendants specifically said, in October of 2008,
25 to Dr. Beterman(phonetic), "Did you discuss Atomoxetine with

1 Dr. Paul when you saw him?" And then Dr. Watanobbi, who was
2 the head of Lilly Research Laboratories, to whom Dr. Paul
3 reported at the time and then Dr. Paul succeeded him and took
4 over from him, was asked by the Defendants, "What was the level
5 of your involvement with Dr. Paul's operations in the
6 Neuroscience's area?" And -- and there are pages and pages of
7 their discussions about him.

8 The Defendants, in that deposition of Dr. Watanobbi,
9 in October of 2008, introduced a management vote at which Dr.
10 Paul was listed as one of the members of the management
11 committees. And we have those documents. They are on the
12 Defendants' exhibit lists.

13 So, as of 2008, they were on notice that Dr. Paul was
14 intimately involved in the discussions at the management --
15 highest management levels of the development of the drug at
16 issue in this trial. And -- and they chose not to depose him.

17 It -- it's our position, Your Honor, that they could
18 have, and, of course, we would have made him available during
19 fact discovery to be deposed, since they were aware that he was
20 intimately involved and had asked about his involvement in the
21 development of Atomoxetine.

22 And we have offered, subsequently, to make him
23 available for a deposition -- even though we think they -- they
24 forego -- they had forgone that opportunity during the course
25 of discovery, we will nonetheless make him available at -- now

1 for a deposition.

2 THE COURT: So he wasn't in the initial disclosures.

3 Was he in answers to interrogatories?

4 MS. MASUROVSKY: He was in the documents that were
5 produced --

6 THE COURT: In the documents.

7 MS. MASUROVSKY: And in documents that they
8 introduced at depositions and asked about his role in -- in the
9 documents that they used in the depositions, beginning in 2008.

10 THE COURT: And when did you first decide to use him
11 at trial?

12 MS. MASUROVSKY: A --

13 THE COURT: When did you let the other side know?

14 MS. MASUROVSKY: When we were contemplating who our
15 trial witnesses were, and we realized Dr. Watanobbi was not
16 available to us anymore because he passed away last year, we
17 realized that we didn't have his live testimony.

18 When we got involved in this case and -- and the
19 Judge ordered us to go put our trial witnesses together for
20 this trial, that's when we pulled together our -- our witness
21 list and -- and identified him as a trial witness, a live trial
22 witness.

23 THE COURT: And where is Dr. Paul?

24 MS. MASUROVSKY: He's recently retired as the former
25 head of Lilly Research Laboratories. He lives in Indiana and

1 is available now for a deposition. We need to check his
2 schedule. He's a -- he's a fairly-busy person still, but he
3 will make himself available for a deposition now.

4 THE COURT: And, just briefly, the substance of his
5 testimony would be?

6 MS. MASUROVSKY: That he's at the management level of
7 the approval of the development of Atomoxetine and -- and was
8 the person to whom the inventors reported and dis -- and
9 disclosed their ideas about the importance of the development
10 of this drug and why it was being developed and -- and those
11 kinds of things.

12 THE COURT: And that's what Dr. Watanobbi would have
13 testified to?

14 MS. MASUROVSKY: Yes, Your Honor.

15 THE COURT: And Wa -- Watanobbi's deposition was
16 taken?

17 MS. MASUROVSKY: Yes, Your Honor. And, in his
18 deposition -- and we have it, and I may hand it up, if Your
19 Honor permits -- he went on at great lengths about the role
20 that Dr. Paul played in the development of the decision-making
21 process within Lilly to develop the drug that's at issue in
22 this case. And his name appeared on the documents that
23 Defendants introduced and put before Dr. Watanobbi as a member
24 of the committee that approved some of the key positions in --
25 in the development of the drug.

1 THE COURT: Okay. This is the first I'm hearing of
2 this that I -- that I'm aware. Is this a motion that you
3 intend to file -- or someone intends to file as an in limine
4 motion, has it been -- is it in writing anywhere or --

5 MS. MASUROVSKY: Uh.

6 THE COURT: -- where does --

7 MR. CLEMENT: Your Honor --

8 THE COURT: -- it stand?

9 MR. CLEMENT: -- if I may? It's --

10 THE COURT: Yeah.

11 MR. CLEMENT: -- Alan Clement.

12 THE COURT: Sir.

13 MR. CLEMENT: Yeah, we just found out about this when
14 the listing of fact witnesses occurred about a week ago. We
15 were never notified about Dr. Paul being a potential witness.
16 He wasn't in their initial disclosures. They never -- they
17 have still not supplemented their initial disclosures, never
18 supplemented their initial disclosures to include him, never
19 identified in any interrogatory.

20 The fact that he was on a couple of documents -- I
21 think Counsel said he was on -- his name is on one -- he
22 authored one document. We -- we deposed everyone who was very
23 much intimately involved. If he was up -- in upper-level
24 management making, you know, higher decisions, you know, he
25 wasn't involved in the real development of the product here.

1 You know, if we tried to depose every single person
2 that appeared on a document that looked like they might have
3 relevant information, I mean, we never would have finished the
4 depositions. It -- you know, we deposed the people that we
5 saw, including Dr. Wabin(sic) -- Watanobbi as having, you know,
6 relevant information.

7 Dr. Watanobbi passed away ten months ago. This is
8 the first we're hearing about it.

9 You know, we had an expert, Dr. Shukla(phonetic), who
10 we brought to your attention. Dr. Shukla, we found out, was
11 ill, w -- might not make it trial. What did we do? We did the
12 right thing. We went and told them we have an expert who is
13 ill and is probably not going -- and we did this, you know, as
14 soon as it happened. We didn't wait until the eve of trial to
15 surprise us, prejudice us.

16 We have to go and take a deposition. We're going to
17 try and get our experts ready for trial. We have to run out in
18 the middle and take a deposition of a fact witness. We don't
19 even know the document -- I mean, when they said, "Dr. Paul,"
20 none of us h -- knew who he was. We couldn't even remember a
21 single document, you know, his name being on.

22 I think it's over-characterizing that we went on for
23 pages and pages in the deposition testimony about Dr. Paul.

24 You know, again, you know, this is s --

25 UNIDENTIFIED: (Whispers) -- also designating

1 Watanobbi.

2 MR. CLEMENT: Right, okay, and they also des --
3 that's right, they have the de -- the deposition designations
4 of Dr. Watanobbi. They can just put those into evidence and --
5 and cover the same t -- you know, the same subject matter.

6 I think they -- they -- you know, we -- we designated
7 testimony for Dr. Watanobbi. They cross-designated. Pretty
8 much, the whole transcript, I think, is coming in.

9 So, at this point, I just don't see the need. I
10 think there's huge prejudice to Defendants to have to take this
11 deposition.

12 Have -- I don't even know that they've searched Dr.
13 Paul's records in his office or on his computer. Do we have
14 all his emails? Do we have all his documents? I don't know
15 what the status is of that. We didn't pursue that, you know.

16 So I -- I just don't know what the s -- the status is
17 right now as -- if we had to take the deposition, we'd be at a
18 great disadvantage.

19 MS. MASUROVSKY: Your Honor, if I may respond
20 briefly?

21 THE COURT: Sure.

22 MS. MASUROVSKY: The -- Rule 26(e)(1)(a) makes it
23 very clear, as do the comments to this rule, that there's no --
24 no need to formally supplement a Rule 26 disclosure if the
25 additional or corrected information has otherwise been made

1 known to the party.

2 And, in the annotations to the 93 amendments, the
3 Federal Rules make it very clear that there's no need for that
4 to happen, particularly in -- when the other information has
5 been made known as when a witness not previously disclosed is
6 identified during the taking of a deposition.

7 And what Dr. Watanobbi said, in response to the
8 Defendants' questions when they asked him how was the Lilly
9 Research Laboratories organized, he said one -- one of the
10 areas that reported to me was Neurosciences and the person for
11 -- res -- responsible for Neurosciences who reported to me was
12 Dr. Steven Paul.

13 And then Defendants said, "Well, let's talk about the
14 Neurosciences' section. Dr. Paul was the head of it. He
15 reported to you." "Uh-huh." "Who were the people under him?"
16 And then -- then they questioned Dr. Watanobbi some more.
17 "Okay, what was the level of your involvement with Dr. Paul's
18 operation in the Neurosciences' area?" And then they marked,
19 at the deposition, the 1997 PTAC vote, which has Dr. Paul's
20 name as a member of the committee on it.

21 So it's not true that they were not aware of the
22 deposition -- the documents that his name was on. And they
23 asked, "Who brought this to your attention?" "Okay, it was
24 either Steven Paul, who reported to me, or it could have been
25 Dr. Gary Tollefson (phonetic), one of the inventors." And then

1 more pages.

2 "Now, does this," Defendants are asking Dr.
3 Watanobbi, "Does the seeing this list of names help you
4 determine whether the initial report of Atomoxetine" -- that's
5 the drug at issue in this case -- "brought to your attention as
6 a potentially efficacious drug in the treatment of ADHD" --
7 that's Attention Deficit Hyperactivity Disorder, the disorder
8 at issue -- "assist you in recalling, as between Dr. Paul and
9 Dr. Tollefson, who it was that brought it to your attention?"
10 And Dr. Watanobbi answers, "I probably knew through a Lilly
11 colleague, such as Dr. Paul, that he was a prominent research,
12 clinical research psychiatrist."

13 More pages, "Do you recall expressing to any
14 individual what you described today?" "I've probably expressed
15 it to Dr. Paul and Dr. Tollefson." And on and on and on.

16 Let me just elaborate a bit here. "Do you -- do you
17 -- you have a specific recollection of having expressed this to
18 Dr. Paul?" This was a question from the Defendants, so they
19 certainly knew enough to ask about him. "Yes, I used to meet
20 with Dr. Paul about once a week when we were both in town,
21 since he was one of my direct reports. We'd have maybe an
22 hour, one-on-one, and he would update me on a number of things:
23 Progress in certain projects, issues that we were developing.
24 We would talk about them." Pages and pages of how intimately
25 he was involved.

1 And it wasn't just at his deposition that they asked
2 about him, Your Honor. At the inventor's deposition, they got
3 his name, a few months before that. "Who is Steven Mark Paul?"
4 That's from -- the Defendants' question from Mr. Clement.
5 "Steven Paul, at the time, was, as I best recall, about that
6 time, would have been -- I think he was the Vice President of
7 Neuroscience." Okay, that was in August of '08, so the
8 Defendants certainly knew about him then.

9 And then they asked the Clinical Research
10 Investigator, Dr. Spencer, "I'm just wondering who at Lilly, if
11 you recall?" "So," answers Dr. Spencer, "John
12 Haliganstine(phonetic), Steven Paul. I think I have his name
13 right. Steven Paul is a senior person there." They certainly
14 understood that -- from Dr. Spencer, that he thought Dr. Paul
15 was a senior person at Lilly.

16 Then they also asked Dr. Beterman, his co-
17 investigator, "Did you have any discussions with Dr. Watanobbi,
18 and what about Steven Paul?" W -- and, again, this is now
19 Aurobindo's asking, Mr. Venchel(phonetic), "Will you tell me
20 what -- generally what the discussions were with Dr. Paul?"
21 So, again, they had many, many, many opportunities to know who
22 Dr. Paul was. They were so informed.

23 And they have, in fact, called, from the hundreds of
24 thousands of documents that we've produced, documents on which
25 DTX-41 -- that's their Defendants' deposition -- Defendants'

1 Exhibit forty -- Trial Exhibit 41 -- a document in which Steven
2 Paul is listed as the sole author.

3 And, again, on DTX-123, it identifies Dr. Paul as a
4 member of the Project Team Approval Committee for Atomoxetine.

5 He's listed on an email that they've chosen to list
6 on their Trial Exhibit List 118 as the recipient of an email
7 from Dr. Watanobbi to the inventors, congratulating them and
8 recapitulating the whole history of the development.

9 He's on another chain of emails later on that they
10 have chosen for their Trial Exhibit List, Defendants' Trial
11 Exhibit 402.

12 They honestly, Your Honor, could not possibly claim
13 surprise, when they were told about his involvement at the
14 highest level of Lilly's Management.

15 And it was their deposition of Dr. Watanobbi, Your
16 Honor. We were not required to and -- and typically wasn't --
17 one doesn't take the direct examination of your highest
18 management executives, while the other side is taking their
19 deposition. So we -- we were -- we will be severely prejudiced
20 if we cannot present to the Court the direct examination that
21 we would take of the highest level of Lilly executives
22 responsible for the development of Atomoxetine.

23 THE COURT: Mmm.

24 MR. CLEMENT: Your Honor, if I may?

25 MS. MASUROVSKY: So with -- so, in closing, I don't

1 think there is prejudice to the Defendants. They could have
2 and probably should have taken Dr. Paul's deposition. They are
3 scrambling now because they didn't.

4 And, with all due respect, we will make him
5 available. And there is no prejudice. They knew about him.
6 They -- we've produced all the documents. They have chosen
7 several of those to be on their exhibit list.

8 And, in fairness, I think the prejudice will be to
9 Lilly and not to the Defendants if he's precluded from
10 testifying at trial.

11 THE COURT: Thank you.

12 MR. CLEMENT: Your Honor, if I can respond?

13 THE COURT: Sure.

14 MR. CLEMENT: First of all, if -- they say we knew
15 about it; they certainly knew about Dr. Paul. It's their
16 documents, their -- their -- their, you know, their management.
17 They could have put him in the 26(a)(1) statement as having
18 knowledge. They could have put him in the interrogatories as
19 having knowledge. They were the ones who chose not to, and now
20 they're trying to spring us with this.

21 Everything that Ms. Masurovsky just read to you was
22 all very general. There was nothing in there that showed that
23 Dr. Paul had any intimate knowledge of things.

24 And I think, Ms. Masurovsky, if I could have Exhibit
25 123 that you were referring to?

1 MS. MASUROVSKY: Certainly. Now, let me give you an
2 unmarked-up copy.

3 (Pause in proceeding)

4 MS. MASUROVSKY: Here you go.

5 MR. CLEMENT: Your Honor, this is the list of names
6 on that exhibit. I think Dr. Paul is -- I don't know, he's
7 some -- he's somewhere in -- I guess somewhere in here. But, I
8 mean, that's a whole list of names. Are we supposed to depose
9 everyone on that list?

10 I mean, sh -- Ms. Masurovsky's pulled off, what, five
11 documents with -- with his name on it? We deposed the people
12 who they told us to -- to look at. They gave us, you know,
13 their initial disclosures. They had a duty to supplement.

14 We told them when Dr. Shukla was ill. They've had
15 ten months to tell us, Your Honor.

16 THE COURT: So when did the Defendants first find out
17 about the proposal to use Dr. Paul as a witness?

18 MR. CLEMENT: A week ago, Your Honor.

19 THE COURT: A week ago.

20 MR. CLEMENT: Yes. And we're ready -- we're ready to
21 file a motion *in limine*. We could do it as -- as soon as Your
22 Honor would like.

23 THE COURT: Okay. Well, I think it -- it is worth
24 being briefed. And I think you should do it immediately,
25 before the -- well -- well, where are we? We're April 19th, so

1 we do -- I guess by April 26th will be fine.

2 (Pause in proceeding)

3 THE COURT: And I guess I have to ask Plaintiff: Why
4 wait til a week ago? That it just seems -- it has a little --
5 a little hint of sandbag in it, to me, just hearing -- given
6 that the case has been under such a -- a focus, under such a
7 microscope.

8 We talked about the trial date, et cetera. And Dr.
9 Watanobbi passed away, you know, ten months ago, according to
10 the Defendants. It seems a week before the final pre-trial --
11 it concerns me.

12 And -- and it's no great prejudice to -- to simply
13 have someone take a deposition before a trial, but we have a
14 final pre-trial. I don't know how it would impact what's in
15 here, what's in the trial briefs, and everything.

16 So what's -- what's the explanation for that?

17 MS. MASUROVSKY: Your Honor, as I think Your Honor
18 may recall, we have had a number of very difficult witness
19 availability issues, because of the scheduling issues. We had
20 not anticipated that we would have this trial at this date. We
21 had been discussing with the Defendants an August trial date.
22 And our understanding that we had worked that out had focused
23 our discussions with various witnesses on August. And then we
24 had this conflict with the Canadian trial.

25 And so it has been a flurry of activity for us to

1 find out what everybody's schedules are. And we have done
2 that, Your Honor, with all deliberate speed, and as
3 conscientiously as we could.

4 And this was when we knew that he was, in fact,
5 available. He's recently retired from Lilly, so.

6 There was no effort to sandbag. It has taken us this
7 much time to pull our -- our availability and witnesses
8 together for this trial and figure out what -- what -- what we
9 would do, in light of everyone's schedule. And we've been
10 doing our best to deal with that as -- as quickly and as
11 expeditiously as -- as we could and as conscientiously as we
12 possibly could.

13 We -- we remain, Your Honor, in a quandary on some of
14 these scheduling issues with our witnesses. Dr. Paul is not
15 one of them, but that is something we'd like to discuss later
16 this morning with Your Honor.

17 THE COURT: Understood.

18 MR. CLEMENT: Your Honor, if I may just respond?

19 THE COURT: Sure.

20 MR. CLEMENT: Just briefly. It just seems a little
21 -- I -- I don't understand. She's saying the witness
22 availability, but Dr. Watanobbi, with all due respect, passed
23 away ten months ago. They could -- that -- that can't be all
24 -- the -- the variation of when the trial was going to
25 occur cannot have factored into that at all.

1 THE COURT: Let me ask a -- a few other questions,
2 and then we will let you brief it and we'll try to decide it
3 quickly.

4 But Dr. Watanobbi was listed as a fact witness in
5 this case, correct?

6 MS. MASUROVSKY: Yes, Your Honor.

7 THE COURT: And was there a description of his area
8 of knowledge?

9 MS. MASUROVSKY: Yes, Your Honor.

10 THE COURT: Because I -- I don't have anything before
11 me. But usually there would be, well, what is -- what is his
12 area of knowledge.

13 And then Dr. Watanobbi's deposition was taken.

14 MS. MASUROVSKY: Yes, Your Honor.

15 THE COURT: And the Defendants have said that you can
16 use the -- the read-ins from his deposition. And of course you
17 say, well, it wasn't a trial deposition; we weren't questioning
18 our own witness; they were questioning their witness. But the
19 -- I thought I heard you say, before, that Dr. Paul wouldn't
20 say anything different than Dr. Watanobbi. Is that true or
21 not?

22 MS. MASUROVSKY: Maybe I wasn't clear in what I meant
23 to say. He would cover the same areas, but we had not asked,
24 at Dr. Watanobbi's deposition, the areas that we would have
25 asked Dr. Watanobbi at trial.

1 What I meant is Dr. Paul would cover the areas that
2 we had anticipated asking Dr. Watanobbi on his direct
3 examination at trial, but we did not ask at his deposition,
4 because it was their deposition and we were preparing for the
5 deposition, but not for the trial testimony.

6 And there are areas of direct examination that an
7 upper-level management Lilly executive would cover at our trial
8 that, if Dr. Watanobbi were here, he would cover, but Dr. Paul
9 could equally well-cover. And that was the reason for our --
10 when we pulled together who could be a trial, that was the
11 reason for our naming him on our Trial Exhibit List.

12 And we -- we did not come into this case til January.
13 And, again, our sights were on a -- a Fall-type trial date.
14 And it has taken us awhile to pull together who could be there
15 in the Spring. And -- and that is the only reason we haven't
16 identified who are trial list was earlier. And that was our
17 time for exchanging the witnesses, and that's when we did it.

18 THE COURT: What's the great prejudice, Defendants,
19 if I allow a deposition --

20 MR. CLEMENT: Well, we're trying to get --

21 THE COURT: -- and this witness --

22 MR. CLEMENT: -- ready for trial, Your Honor, with
23 our experts. We have meetings with our experts scheduled over
24 the next couple weeks.

25 You know, we've put together the pre-trial brief

1 based on what we knew from Dr. Watanobbi. We're going to have
2 to send someone over to, you know, depose Dr. Paul, look at all
3 the documents, get -- get that all together.

4 I don't -- I'm --

5 THE COURT: What -- what do you mean the documents?
6 There -- there shouldn't be any different documents. I would
7 --

8 MR. CLEMENT: Well, that's what we don't know. We
9 don't know that they've even produced all the documents that
10 Dr. Paul was on. It -- it -- you know, and we're not so sure
11 that all the documents that he was on are on the exhibit list.
12 We may now want to put new documents onto the exhibit list,
13 based on documents we find with Dr. Paul's name that Dr.
14 Watanobbi wasn't on.

15 You know, when we asked about Dr. Paul during these
16 depositions, it was just to get the overall sense of who was
17 where in Lilly. It wasn't a -- you know, a discovery-taking
18 type deposition that we were going -- focusing on for use at
19 trial.

20 You know, I think that we have been sandbagged here.
21 They -- they've known for ten months that Dr. Watanobbi was not
22 going to trial. The fact that their -- switch counsel again in
23 January shouldn't be a prejudice to Defendants.

24 We're trying to get ready for trial. We have a lot
25 -- lot of work to get done. As you see, it's a -- it's a big

1 pre-trial order, and we have a lot of work to do.

2 THE COURT: True, but I'm confident you have the --
3 the staffing to do it.

4 But I -- I think it -- it should be briefed and -- as
5 quickly as possible.

6 And my recommendation to the Plaintiff is, if this is
7 very important to you -- and of course I'm not deciding the
8 issue right now. I don't think it's fair to the parties or
9 even fair to the Court to decide it just on what I'm hearing
10 now -- the Plaintiff might consider an extremely-detailed
11 proffer, including questions and answers that you would expect
12 to have from Dr. Paul and -- as part of your brief.

13 And then that may enable the Court to determine how
14 big a deal this is, one. And, two, whether the Defendants
15 really will oppose it with such -- such ardor, shall we say,
16 given -- it -- it may -- it may not be that significant. I
17 don't know.

18 But it seems awful late in the game. But, then
19 again, it's a month before trial.

20 Go ahead, Mr. Clement.

21 MR. CLEMENT: I just have one request --

22 THE COURT: Yes, sir.

23 MR. CLEMENT: -- if you're going to let them do a
24 question and answer in response to our motion *in limine*, that
25 we would just like a -- a sh -- a short period of time to put

1 in a reply, maybe a day or two after that?

2 THE COURT: Well, I -- I think I'm going to decide it
3 right on -- it can -- it -- we're getting too close to the
4 trial. If I'm going to allow a deposition, it's going to be in
5 all of your -- your interests that we do it --

6 MR. CLEMENT: That's why I'm only saying a day or two
7 for the reply. I mean, I wasn't asking --

8 THE COURT: Yeah, yeah. I don't --

9 MS. MASUROVSKY: We --

10 THE COURT: -- I don't think we need --

11 MS. MASUROVSKY: -- we have no objection.

12 THE COURT: I -- I don't need a reply.

13 MS. MASUROVSKY: Okay.

14 UNIDENTIFIED MALE: I assumed Your Honor wanted
15 simultaneous briefing on --

16 MS. MASUROVSKY: (Whispers) No, no, he's given -- no,
17 given us the schedule. He's given --

18 UNIDENTIFIED MALE: (Whispers) Make the --

19 UNIDENTIFIED MALE: (Whispers) Make the motion.

20 MR. CLEMENT: Okay, then maybe they can make the
21 motion first, with the questions and answers, and we'll reply
22 to that.

23 THE COURT: I think that's a good idea. I think you
24 should put --

25 UNIDENTIFIED MALE: It's our mo -- our motion, Your

1 Honor.

2 THE COURT: Absolutely.

3 UNIDENTIFIED MALE: Thank you.

4 THE COURT: Yeah --

5 MR. CLEMENT: Thank you, Your Honor.

6 THE COURT: Are there any other issues out there that
7 are discovery-related or anything like that? Because you don't
8 list your *in limine* motions. How many are there?

9 (Pause in proceeding)

10 MR. CLEMENT: I think we have six or seven, Your
11 Honor.

12 THE COURT: Okay. I think you should make a list --
13 it doesn't have to be today, but in the next day or so -- if
14 you haven't done so.

15 Have you -- have you made a list for Judge Kavanaugh?

16 MR. CLEMENT: We have not made a list, but we know --
17 I think we know what motions we're making at this point.

18 THE COURT: Well, normally, we -- we list them in the
19 final pre-trial order.

20 Now, I know we -- we're dealing with a -- a very-
21 specific briefing schedule that Judge Kavanaugh has
22 established. But I think it would be good to know right away
23 --

24 MR. CLEMENT: Okay, we --

25 THE COURT: -- if you'll make a list --

1 MR. CLEMENT: We --

2 THE COURT: -- both sides, of your *in limine* motions,
3 okay?

4 MS. MASUROVSKY: Yes, Your Honor.

5 MR. CLEMENT: We can certainly do that.

6 THE COURT: Thank you.

7 All right, we'll just keep going through the final
8 pre-trial. Stipulation of facts speaks for itself. Let's see
9 how many pages that goes for.

10 (Pause in proceeding)

11 And then we come to I guess up to 12, you have the
12 contested facts. Anything to be discussed there? I would
13 expect not.

14 Witnesses, any other problems with the witnesses?
15 For example, Plaintiff's witnesses, any --

16 MS. MASUROVSKY: Yes, Your Honor.

17 THE COURT: Okay.

18 MS. MASUROVSKY: Thank you very much, Your Honor.

19 THE COURT: Yup.

20 MS. MASUROVSKY: As -- as Judge Kavanaugh's trial
21 rules contemplate, we may ask Ju -- Judge Kavanaugh to take Dr.
22 Plitska(phonetic), who's a treating physician in his practice
23 -- treating patients with ADHD, before he needs to get back to
24 his -- to them, he's arranged for coverage through May 28th.
25 And we think that should be sufficient, given the Judge's trial

1 schedule. But, just in the event it's not, we wanted to flag
2 that as an issue; that he has patients to get back for. Thank
3 you, Your Honor.

4 THE COURT: Okay. I'm sure he'll take that up.

5 MS. MASUROVSKY: And I have one more witness conflict
6 issue --

7 THE COURT: Sure, go ahead.

8 MS. MASUROVSKY: -- to raise with the Court. And
9 that is something we've raised before, and that is the Canadian
10 trial involving the same drug. And one of the parties, a
11 Canadian counterpart, defendants here, involves two of Lilly
12 employees to testify at that trial, Dr. Hines(ph) and Dr.
13 Allen(ph).

14 And they will be needed in Canada the week of May
15 31st. Again, we hope that won't be a problem, given the trial
16 schedule, but I wanted to flag it just in case there was any
17 issue.

18 We would ask that they simply be taken out of turn,
19 if necessary. But, hopefully, it won't be necessary.

20 THE COURT: Counsel?

21 UNIDENTIFIED MALE: Your Honor, on a related issue,
22 actually, as long as we're talking about the -- the fact
23 witnesses, on page 343. As you see, Lilly has listed in
24 somewhat vague fashion they may call any number of one, two,
25 three, four, five, six, seven fact witnesses.

1 The Defendants, just to prepare for trial, Your
2 Honor, the Defendants were wondering is it possible to get an
3 order, in fairly short order here, ordering Lilly to tell us
4 which one of these are actually coming to testify live, so that
5 we know, Your Honor.

6 The Defendants, I believe, have not -- the Defendants
7 -- the Defendants have identified no fact witnesses live for
8 trial, but the Defendants would like to know who is Lilly
9 bringing live for trial and when.

10 Lilly is all concerned about these people's
11 schedules, when it comes to the Canadian litigation. Well, we
12 think it's only fair, Your Honor, if that's going to be taken
13 into consideration, Defendants would like to know, for our
14 preparation and schedules, which one of these witnesses are
15 coming and when.

16 And especially if we need to call them for our case
17 in chief, which we may very well have to, Your Honor, both in
18 our case, question them in Lilly's case, and, who knows, we may
19 even want them for rebuttal. So we need to know who is going
20 to be in New Jersey and when.

21 THE COURT: Well, this sort of order is relatively
22 routine as being the province of the -- the trial judge. I
23 think there's a certain issue of reasonableness.

24 But, Plaintiff, what do you have to say about that?
25 When can you identify who you're going to call?

1 MS. MASUROVSKY: Your Honor, it partly depends on
2 what proof they put on at trial. They're going first. And, if
3 they do not put on any evidence on certain issues, we will not
4 need to call certain witnesses. It really depends on how they
5 try their case.

6 And, if they'd like to tell us now what order and who
7 and what issues they will try. I mean, we have some motions
8 which may address that, *in -- in limine* motions, that may
9 change the contours of the trial and who will come, depending
10 on the rulings on those motions.

11 But it -- it really depends on how they try their
12 case and whether we feel witnesses are necessary to rebut their
13 case if --

14 THE COURT: We had discussed the order of proof, of
15 course, in this case before. Is that going to be a part of --
16 an *in limine* motion?

17 MS. MASUROVSKY: Well, there is one aspect of it that
18 we would like to raise as a motion, Your Honor, if the Court
19 doesn't rule on it today. And that is you had advised us that
20 Judge Cavanaugh has already ruled that the Defendants get to
21 put on their proof first, their case in chief first.

22 We would like, consistent with Judge Cavanaugh's
23 prior rulings in the Novartis and Pfizer cases last year, in
24 such cases, to allow the patentee to put on a backdrop of the
25 invention tutorial, because of the complex city(phonetic) of

1 the science is appropriate for a short tutorial at the
2 beginning of -- the outset of the case.

3 So we'd -- we would request the Court's authorization
4 to do that, as is typical in -- in what Judge Kavanaugh has
5 ruled on.

6 THE COURT: Is that going to be one of your *in limine*
7 motions?

8 MS. MASUROVSKY: If -- if the Court would give us
9 permission to go ahead with that, we could schedule that now,
10 or we'll bring it by motion. That was one of the things we
11 wanted to raise.

12 THE COURT: Well, you made a record of asking for it.
13 I think it's a, you know, a legitimate request. But it's
14 something that's going to be decided by Judge Kavanaugh. So I
15 think you better file a motion on that or memorialize it
16 somehow.

17 MS. MASUROVSKY: Thank you, Your Honor.

18 THE COURT: Counsel?

19 UNIDENTIFIED MALE: Your Honor, putting -- we --
20 putting aside the tutorial issue --

21 THE COURT: Yeah.

22 UNIDENTIFIED MALE: -- we've laid out in excruciating
23 detail what our case is going to be; the theories and the
24 issues that we're going to try. Lilly knows what they are.

25 So to say that they can't tell us who these fact

1 witnesses are and when they're going to show up because they
2 don't know what our case is going to be is -- is simply not
3 true, Your Honor.

4 And you can always say, well, it'll depend on their
5 case, whether we bring them in live. And then that sandbags
6 us, because we don't know whether we can use them in our case
7 in chief.

8 If they're going to bring these people live, we
9 should have them available for the whole case, not just for
10 Lilly to sit back and spring them on us at the last second.

11 THE COURT: Well, I mean, the -- the -- the idea is
12 fairness to both sides. And, just as a practical matter in
13 trying cases, it -- it helps to know.

14 What -- what do you propose?

15 UNIDENTIFIED MALE: That we would prop --

16 THE COURT: I mean, that your -- you would have to
17 comply the same way. In other words, Counsel, you -- you said
18 that, if -- if -- if Defendants would advise who they're going
19 to call and when and in what order --

20 MS. MASUROVSKY: Well, Your Honor --

21 THE COURT: -- I mean --

22 MS. MASUROVSKY: -- if we win on some of our motions
23 in limine, there will be no need for some of these witnesses.

24 We have withdrawn commercial success as one of the
25 issues in the case. We think that should eliminate a number of

1 their expert witnesses and; therefore, there would not be any
2 need for fact witness testimony on that issue. That would
3 remove some of the names. But we don't know yet.

4 If they fail to prove their case in their case in
5 chief, it would not be necessary for us to bring a -- an
6 opposing witness to -- to detail the facts, if we feel they
7 have not brought forth evidence to meet their burden.

8 It is their burden to prove invalidity or
9 unenforceability. And, if, at the close of their evidence, we
10 feel that we have won our case, we would not need to bring a --
11 a fact witness.

12 THE COURT: I don't think that's really answering the
13 question. I mean, the -- the -- the question really is -- and
14 I'm not ordering it today, I -- I must say. I think it's a
15 reasonable request that -- in my experience in trial of cases,
16 at some point, the parties should say.

17 But the -- the way to look at it is, assuming that
18 you lose your motions and that they proceed with their case as
19 they've identified, which of these witnesses is going to be
20 called? That's the way to think about it, rather than if you
21 win your case.

22 I mean, sure, if I don't -- I mean, I don't even know
23 what the motions are; they're not listed here, so.

24 I'm going to defer the issue. I think the parties
25 should confer on this. Usually, we agree on this by -- the

1 parties agree on when they're going to disclose the -- the
2 actual witnesses that are going to be called. And we're a
3 month before trial, and I think there is a date before trial
4 when this should be done. I don't feel strongly that today is
5 the date, but I appreciate the request.

6 I'd ask that you confer on it and get back to me, let
7 me know.

8 MS. MASUROVSKY: We will do that, Your Honor.

9 THE COURT: Okay. Any other witness issues? No,
10 okay. Bear with me one second.

11 (Pause in proceeding)

12 THE COURT: Any expert witness issues? That -- I --
13 there may be some obviously that are going -- going to be
14 addressed in your *in limine* motions. Nothing else.

15 Depositions, you've identified read-ins.

16 Exhibits, how about document problems? Are there any
17 -- take the Plaintiff's document -- exhibit list, are there any
18 documents there that Defendants contend they've not seen before
19 or weren't produced in discovery?

20 UNIDENTIFIED MALE: Your Honor, there are a number of
21 documents that we did see when we were going through the
22 exhibit list that had not been produced before.

23 We objected to those under the Federal Rules of Civil
24 Procedure, mostly. Because, if they're going to be used in the
25 trial, they should have been produced during discovery.

1 THE COURT: I agree. Have you conferred on this at
2 all?

3 UNIDENTIFIED MALE: We have not conferred. I --

4 THE COURT: How many are --

5 UNIDENTIFIED MALE: -- we just got these things
6 together last, you know --

7 THE COURT: I understand, but, you know, this is more
8 of a, once again, a magistrate judge-type issue. I'd like to
9 help Judge Kavanaugh, so he doesn't have to deal with that
10 issue at trial. So how many are there?

11 UNIDENTIFIED MALE: Well, that's the thing; I don't
12 know how many of those they're actually going to introduce. So
13 we were going to do it on a document-by-doc -- but there was --
14 there was quite a number of them, Your Honor.

15 THE COURT: Are you familiar with this, Counsel? Do
16 you know what --

17 MS. MASUROVSKY: Your Honor, I think he's referring
18 to the publications. Both sides added publications to their
19 exhibit list. And I think these are -- they're either
20 publications that will come in as prior art, and we will confer
21 about what's going to come in or not, or -- or they won't,
22 because some party has an objection.

23 I don't -- I don't think these are documents that
24 needed to have been produced in discovery. These are all
25 public-record documents that were available to both parties --

1 are part of the literature that both sides have drawn upon.
2 And I think that we can, in the process of getting ready for
3 trial, work through or confer about our issues. And we will --
4 we have -- we've stated -- we have noted our respective
5 objections on the exhibit list.

6 THE COURT: Yeah, but I'm not going to have Judge
7 Kavanaugh, at a trial of this magnitude, dealing with discovery
8 question "X," and one side saying this should have been
9 produced in response to discovery and one shouldn't have been
10 produced.

11 And so --

12 UNIDENTIFIED MALE: And, Your Honor, if it's prior
13 art and it's relevant, it should have been produced.

14 I -- I don't think that we have any documents on our
15 exhibit list that are publications that have not been produced
16 to Lilly before. I -- I certainly don't recall any, as I sit
17 here now.

18 I do recall going through their list and seeing a
19 hundred or so of these where we had to make FRCP ob --
20 objections on the list.

21 MS. MASUROVSKY: Well, Your Honor, this is the first
22 I'm hearing of it. They could have brought it to our attention
23 over the time period that we've been exchanging numerous
24 communications and correspondence, and they haven't. If they
25 have some beef about it, they should let us know and we'll try

1 and work through it.

2 THE COURT: Well, I'll deal with it. How about
3 Plaintiff; does Plaintiff have any similar problems with
4 Defendants' list?

5 MS. MASUROVSKY: Yes, Your Honor, we have a document
6 that will be the subject of a motion, where we had asked --
7 they had it on their exhibit list as both a -- an original that
8 was produced to them from the government in response to a
9 Freedom of Information Act request from the F -- FDA, Food and
10 Drug Administration, and they also had a copy of that document,
11 which they represented to be authentically a copy of the
12 original.

13 They pulled both off their exhibit list. The copy is
14 on our exhibit list. We asked them to bring the original to
15 court, so that we would eliminate any authenticity objection
16 that they might have. They refused. They maintain an
17 authenticity objection, among others. And so that will be the
18 subject of a -- of a motion.

19 We -- we don't understand their refusal to bring the
20 original and had asked the Court to require them to make it
21 available to us.

22 UNIDENTIFIED MALE: Your Honor, if I may respond?

23 THE COURT: Sure.

24 UNIDENTIFIED MALE: It's not on the Defendants'
25 exhibit list. We've taken it off. It was -- this is a

1 document that Lilly -- it's -- it's an IND(phonetic) that they
2 paid for. They could have obtained it themselves. It's a
3 public document.

4 One of the other defendants, who's no longer in the
5 case because they've entered into a stay with Lilly, was the
6 defendant who made the Freedom of Information Act request to
7 get the document. It's not one of these Defendants' documents
8 per se.

9 So, while we did have copies, do we have
10 riven(phonetic) copy? I mean, it's -- it's -- it's te -- it
11 was -- it was one of the other defendants who had made the
12 request and had the document and actually produced the copy to
13 Lilly. It's not one of the Defendants currently sitting here.

14 (Pause in proceeding)

15 THE COURT: But the Defendants are maintaining --
16 it's coming to me awful fast -- the Defendants are maintaining
17 an authenticity objection? Is that --

18 UNIDENTIFIED MALE: I -- I'm not -- I'm not a hundred
19 percent -- I don't have that in front of me. If we made a -- I
20 don't know, did we made an authenticity objection to it?

21 THE COURT: I think this one -- I mean, we're --
22 we're letting you have until April 26th to brief these *in limine*
23 motions, and I think that includes the one -- well, perhaps we
24 should revisit the -- the dates on the -- the one that was the
25 magistrate judge-type issue, which is your Dr. Paul issue.

1 This is another one that I would like to see. Maybe
2 I can resolve this before trial.

3 So, at the end of our proceeding, we'll -- we'll
4 figure out what to do with the -- these two *in limine* motions.
5 I'm certainly going to want this delivered to my chambers
6 directly -- whenever we say it's due -- and I'll decide it. I
7 -- I just can't -- it doesn't seem like a big deal to me. If
8 you -- do Defendants have this document?

9 UNIDENTIFIED MALE: We can certainly obtain it.

10 THE COURT: You can obtain it.

11 UNIDENTIFIED MALE: Yeah, we can get it from --

12 THE COURT: Is it burdensome? Is it expensive?

13 UNIDENTIFIED MALE: No, we'll -- I mean, we can
14 confer with them on it.

15 THE COURT: I can't see --

16 UNIDENTIFIED MALE: I don't know -- I don't know that
17 we have an authenticity --

18 THE COURT: I mean, they could subpoena the doc -- it
19 would seem to me you could subpoena it for production at trial.

20 UNIDENTIFIED MALE: Right, I --

21 THE COURT: I don't see --

22 UNIDENTIFIED MALE: I -- I think we --

23 THE COURT: -- this as a big issue.

24 UNIDENTIFIED MALE: -- can work -- I don't -- yeah.

25 We do have one issue. Mr. Rockey's going to address

1 it, if we --

2 THE COURT: Okay.

3 UNIDENTIFIED MALE: -- if we may, Your Honor.

4 MR. ROCKEY: Your Honor, the -- the one *in limine*
5 motion which is perhaps nearest and dearest to my heart is the
6 -- an affidavit of Dr. Spencer. And Your Honor may recall you
7 dealt with that during the discovery phase of the case.

8 Essentially, what is involved -- what happened was
9 Dr. Spencer was deposed. I think it was something like three
10 or four days before the close of discovery, Lilly produced an
11 affidavit that he had submitted in connection with the
12 prosecution. I believe it was a British application.

13 UNIDENTIFIED MALE: Brazil. Brazil.

14 MR. ROCKEY: Brazil?

15 UNIDENTIFIED MALE: Brazil. Brazil.

16 MS. MASUROVSKY: Brazil.

17 MR. ROCKEY: Okay, Brazil. And the affidavit
18 basically suggested that this was a breakthrough invention, et
19 cetera, et cetera. It was -- it was laudatory of the
20 invention.

21 So we said, well, you know, we don't understand why
22 it took you so long to produce it, but, in any event, we're
23 going to have to take his deposition(sic) -- take his deposition.

24 Well, he refused to be deposed. Lilly refused to
25 take his deposition. And now they propose to use the

1 affidavit. And it's, you know, it's rank hearsay, of course.
2 But that is going to involve one of our -- our motion -- one of
3 our motions *in limine* will deal with that situation.

4 Because I think Your Honor ruled, as I recall, as a
5 result of a telephone conference, that we could take the deposi
6 -- or Lilly could take the deposition. And then they said, no,
7 we're not going to, and turned around and said, but we're going
8 to use the affidavit anyway.

9 So we have a -- we have a real problem with that,
10 Your Honor.

11 THE COURT: It sounds more like an evidentiary issue
12 to me, Mr. Rockey, which I think would be decided by Judge
13 Kavanaugh. But I think that maybe you can deliver that one to
14 me as well and we'll --

15 MR. ROCKEY: Okay.

16 THE COURT: -- I'll take it up with Judge Kavanaugh
17 --

18 MR. ROCKEY: That's fine, Your Honor; we're happy to
19 do that.

20 THE COURT: It sounds -- it sounds like an
21 evidentiary issue, I think, more than a discovery issue.

22 MR. ROCKEY: Well, it certainly --

23 THE COURT: I could be wrong.

24 MR. ROCKEY: -- is an evidentiary issue.

25 THE COURT: So I'm -- you know, I'm not -- I don't

1 usually decide evidentiary issues. I'm -- but I -- it does
2 have a discovery component, which I understand. But I -- I
3 don't think that's -- I think that's one that will probably be
4 decided by Judge Kavanaugh.

5 MR. ROCKEY: Thank you, Your Honor.

6 THE COURT: Thank you.

7 So where were we? We were on the issue of the
8 witnesses. No, the -- the exhibits; I'm sorry.

9 (Pause in proceeding)

10 THE COURT: So the parties are going to confer
11 regarding any document which a party claims was not properly
12 produced in discovery.

13 And then, to the extent that that is -- remains an
14 objection, it will be briefed, and I'll decide the issue.

15 (Pause in proceeding)

16 Now, we're a month before trial. There's a lot of
17 time to alleviate any real prejudice. And the fact that you're
18 busy and pressed is completely understandable and I'm
19 sympathetic to it, but, given the stakes and the -- the
20 expenses put out in counsel fees in this type of a case, I
21 wouldn't expect there would be too many exhibits that would be
22 excluded as complete surprises at this point.

23 So what I would look to is ways of alleviating any
24 possible prejudice. It doesn't sound like these things were
25 surprises, but perhaps they are; I don't know. I can't imagine

1 that something is going to first show up on an exhibit list as
2 prior art in a case of this type and with this much discovery
3 and it's never been mentioned before, but maybe I'll be
4 surprised.

5 So I don't know if you -- I want to be very clear.
6 The parties are to immediately confer about any documents on
7 either exhibit list that they claim were not produced in
8 discovery and try to find a way to resolve that issue. And, if
9 you can't resolve it, bring it to my attention, the sooner the
10 better, and definitely no later than the 26th.

11 All right, the legal issues speaks for itself. Let
12 me go to page 645 -- see here -- the miscellaneous --

13 (Pause in proceeding)

14 THE COURT: Okay, I'm just going to go through them.
15 On page 645, the request to present a brief tutorial on the
16 technology, et cetera, at the start of the trial. That was
17 already mentioned. And it's something that needs to be raised
18 with Judge Cavanaugh.

19 The issue about the order of witnesses and the -- the
20 problems with witnesses. Likewise, those will be raised and
21 decided by the Trial Judge.

22 Number four, that the Court permit only one attorney
23 from each side to question each witness. Once
24 again, this is all within the province of Judge Cavanaugh.

25 The IND, that's what we just discussed, I think.

1 Lilly plans to withdraw commercial success. That's
2 Straterra -- as objective evidence is not -- okay.

3 Dr. Paul. So we discussed him.

4 And then Defendants -- let's see -- are just
5 basically responses. Let's see what else.

6 UNIDENTIFIED MALE: Just responses, Your Honor.

7 THE COURT: Yeah. So, basically, we've -- we've
8 covered all those issues; excellent.

9 | (Pause in proceeding)

10 THE COURT: So are there any other issues that we
11 haven't raised that you'd like to raise now?

12 MR. PARKER: Your Honor, Tom Parker.

13 THE COURT: Yeah.

14 MR. PARKER: Just with respect to, on page 645, with
15 item number four, concerning Lilly's re -- request that the
16 Court permit only one attorney for each side to question each
17 witness. Should -- should Plaintiff raise that with -- with
18 Judge Cavanaugh by -- by way of motion, or should that be
19 raised at the day of -- I'm just trying to get some timing in
20 terms of how that should be handled; a recommendation.

21 THE COURT: You know, obviously, that's not a -- a
22 big legal issue --

23 MR. PARKER: Right.

24 THE COURT: -- it should be raised with Judge
25 Kavanaugh.

1 Given that we have this tight schedule, I would
2 include it as a -- an *in limine* motion. It doesn't need a
3 brief or anything formal, but it -- it'll set before the Judge,
4 you know, several weeks before the trial -- the issue. And
5 then he'll decide and he'll -- he'll let you know.

6 Any other issues?

7 UNIDENTIFIED MALE: Very quickly --

8 THE COURT: Mr --

9 UNIDENTIFIED MALE: -- Your Honor. We wondered if we
10 could get the Court's guidance on whether Judge Kavanaugh's
11 going to want openings and closings. If so, if there's going
12 to be timing on that. And is that something Your Honor thinks
13 we should raise with Judge Kavanaugh now via a letter or
14 motion, or wait, or request a -- a con -- a pre-trial
15 conference with Judge Kavanaugh?

16 We just want to seek some type of guidance, so we
17 know how the -- the -- the phases of the trial are going to
18 proceed.

19 THE COURT: I'll raise the issue with Judge Kavanaugh
20 immediately, and perhaps we can have a telephone conference.
21 And I -- we'll do it -- if we have an answer for you or not.
22 Otherwise, then you should raise it with Judge Kavanaugh
23 directly.

24 UNIDENTIFIED MALE: If -- if Your Honor -- could Your
25 Honor also raise -- or we would request you could also raise

1 the -- the days we'll be trying the case, will it be full trial
2 days, all five days a week, or if it will be --

3 THE COURT: Why don't you put this in a letter.

4 UNIDENTIFIED MALE: We could do that, Judge.

5 THE COURT: I think you should put it in a letter.

6 The -- the -- the different questions you have about that kind
7 of thing.

8 UNIDENTIFIED MALE: Addressed to Your Honor?

9 THE COURT: You could address it to me, or you could
10 address it directly to Judge Kavanaugh. But, if you address it
11 to me, I'll shepherd it there.

12 UNIDENTIFIED MALE: Thank you, Judge.

13 MS. MASUROVSKY: Thank you, Your Honor. For -- for
14 Lilly, we would very much appreciate the opportunity to present
15 an opening statement of the issues and -- and a closing
16 argument.

17 THE COURT: Okay, send me -- and, if there -- yeah, I
18 -- I -- I think you should put that in writing, your positions.
19 And we'll see what the Judge wants to do.

20 How long do you expect the trial to be?

21 (Pause in proceeding)

22 UNIDENTIFIED MALE: I'm going to venture an estimate
23 of seven to eight days.

24 THE COURT: Seven to eight days.

25 UNIDENTIFIED MALE: I think that we should be able to

1 make a substantial progress in putting in our case during the
2 week of the 18th. Anybody disagree with that?

3 That's -- that's -- at least that's the plan, Your
4 Honor.

5 THE COURT: Understood.

6 Okay, have you assigned this final pre-trial. Is it
7 slashed? How do you -- how do you have it?

8 MS. MASUROVSKY: Yes -- yes, Your Honor. It was
9 assigned electronically and filed electronically.

10 THE COURT: So I'm going to sign it and enter it on
11 the docket.

12 Just to review what we've discussed here today, I
13 guess, first of all, I'd like to get a list from both sides as
14 to the specific *in limine* motions you intend to bring. And I
15 know they're due on the 26th, so I'd like to get that list this
16 week, before then.

17 Do we have the Ron(sic) Paul -- not Ron Paul --

18 (Laughter)

19 UNIDENTIFIED FEMALE: Nor -- nor Les Paul, Your
20 Honor.

21 UNIDENTIFIED MALE: Les?

22 UNIDENTIFIED FEMALE: Dr. Steve Paul.

23 THE COURT: Dr. Steve -- Dr. Steve Paul issue. And I
24 have -- from what I've heard, I'd -- I'd like the Plaintiff to
25 raise the issue and provide the other side with a proffer.

1 MS. MASUROVSKY: Yes, Your Honor, we will do that.

2 THE COURT: But now we need to figure out dates. I'd
3 like to have this thing briefed as quickly as possible.

4 How quickly can you provide that, Plaintiffs?

5 MS. MASUROVSKY: A -- a week, Your Honor?

6 THE COURT: Okay.

7 (Pause in proceeding)

8 THE COURT: Well, then I'm going to want to get a --
9 a response from the Defendants very quickly.

10 UNIDENTIFIED MALE: I was going to ask for a week,
11 Your Honor? I mean, it's the same schedule as the --

12 THE COURT: Okay, it's fine --

13 UNIDENTIFIED MALE: -- other *in limine*.

14 THE COURT: -- given the fact that, if we do order
15 this deposition, it's --

16 UNIDENTIFIED MALE: (Whispers) Do you want to do it
17 quicker?

18 THE COURT: -- the pressure will be on you folks.

19 UNIDENTIFIED MALE: All right, so, if it's a week, if
20 -- if you're going to do it on a Monday, we'll have it in by
21 that Friday.

22 THE COURT: Okay.

23 And then the final issue is --

24 (Pause in proceeding)

25 THE COURT: -- is the exhibits that parties claim

1 were not produced in discovery, but are going to be proffered
2 at trial. And the parties are directed to immediately confer
3 on those and see what you can do to limit the number or
4 alleviate any possible prejudice and then raise the issue in
5 the normal course as an *in limine* motion.

6 Anything else, folks?

7 MS. MASUROVSKY: No, thank you, Your Honor.

8 THE COURT: Okay.

9 UNIDENTIFIED MALE: I don't think so, Your Honor.

10 UNIDENTIFIED MALE: No, Your Honor. Thank you very
11 much.

12 THE COURT: Thank you all very much.

13 UNIDENTIFIED MALE: Thank you, Your Honor.

14 THE COURT: Good luck.

15 UNIDENTIFIED MALE: Thank --

16 MS. MASUROVSKY: Thank you, Your Honor.

17 UNIDENTIFIED MALE: Thank --

18 COURT CLERK: All rise.

19

20

21

22

23

24

25 (Whereupon, at 11:20 a.m., the conference was concluded.)

1

CERTIFICATE

2

3 I certify that the foregoing is a correct transcript from
4 the electronic sound recording of the proceedings in the
5 above-entitled matter.

6

7

S/ Sonia Undseth

8

Signature of Assigned Transcriber

April 29, 2010

9

Date

10

Sonia Undseth, Assigned Transcriber
King Transcription Services
65 Willowbrook Boulevard
Wayne, NJ 07470
(973) 237-6080

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25